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IN THE

Supreme Court of the United States

October Term, 1949

No. 49

HELEN PARKER, IONE LANE WHEELER, KATHERINE GATES, CORNELIUS WEBSTER, WILLIAM G. COLE, J. L. MARTIN, ROBERT L. McGUIRE, JULLEANA GLISBY, ALICE M. PARSONS, CAROLINE POTTENGER, JOHN R. McCROSKEY, MATTIE A. BELINO, ADA GRUVER, MAJOR WEST, ALICE WALSH, C. H. DEMAREST, BETTY S. SELDEN, MIRIAM LASAROU, RALPH L. DAVIS, WINIFRED McCONNELL, COLUMBUS S. BELL, SHIRLEY GALAT, RUTH THOMASEN, KENT HAMMOND THIES, LAWRENCE LUCKS,

Petitioners,

vs.

COUNTY OF LOS ANGELES; WILLIAM A. SMITH, LEONARD J. ROACH, JOHN ANSON FORD, RAYMOND V. DARBY and ROGER W. JESSUP, and Each of Them as Members of the Board of Supervisors of Said County; WAYNE ALLEN, as Chief Administrative Officer of Said County; HAROLD W. KENNEDY, as County Counsel of Said County; CHARLES C. MACK, G. H. NEWLAND and T. J. O'KEEFE, and Each of Them, as Members of the Civil Service Commission of Said County; CLIFFORD AMSDEN, as Secretary and Chief Examiner of Said Commission; MICHAEL DONOGHUE, as Registrar of Voters of Said County,

Respondents.

BRIEF FOR PETITIONERS.

On certiorari to the District Court of Appeal, Second Appellate District, of the State of California to review the decision of that Court rendered November 12, 1948 (P.

47)* affirming the judgment of the Superior Court of the State of California, in and for the County of Los Angeles, entered March 9, 1948 (P. 34) dismissing petitioners' action following the entry of an order on March 5, 1948 (P. 34) sustaining respondents' demurrer to petitioners' amended complaint without leave to amend. The Supreme Court of California denied a hearing (P. 76).

Opinions Below

The opinion of the Superior Court (P. 35) is not reported. The opinion of the District Court of Appeal (P. 47) is reported in 88 Cal. App. 2d 481. The Supreme Court of California rendered no opinion upon its denial of a hearing (P. 76).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and 2101 (c). This Court granted certiorari June 13, 1949.

The judgment of the District Court of Appeal was entered November 12, 1948 (P. 47, 63). The order of the Supreme Court of California denying a hearing was entered January 10, 1949 (P. 76).

The constitutional issues here presented were urged in the trial court (P. 8-16), considered by it (P. 39) where they were overruled (P. 39-43, 34); they were urged before and considered by the District Court of Appeal (P. 49, 60-61) where they were also overruled (P. 56, 57-63); and they were urged before the Supreme Court of California (P. 69-74) which Court declined to grant a hearing thereon, one Justice voting in favor of granting such a hearing (P. 76).

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*References to the record will be preceded by the letter "P", signifying the printed record filed in this case. This is a companion case to *Steiner vs. County of Los Angeles, et al*, October Term, 1949, No. 50. A joint Petition for Writs of Certiorari was filed in both cases. The parties now submit their respective causes upon separate briefs and argument.

State Action Involved

The issues presented in this case arise out of an order adopted by the Los Angeles County Board of Supervisors on August 26, 1947 (hereinafter called the Loyalty Order), requiring *inter alia* execution by all County employees, as a condtion of continued employment, of an Oath and Affidavit in the form set forth in said Loyalty Order. The Loyalty Order appears in the Record at P. 16-25, and the Oath and Affidavit at P. 19-25.

Statement

Facts—There are no disputed issues of fact, the trial court having sustained the respondents' demurrer (P. 25) to petitioners' amended complaint (P. 1) without leave to amend (P. 34). Accordingly, the facts before this Court are found in the amended complaint and in the Loyalty Order attached thereto as Exhibit "A" (P. 16-25) which is incorporated in and made a part of the complaint (P. 5, par V). The facts, as framed by the complaint and demurrer, are as follows:

Petitioners are citizens of the United States (P. 2-3) and permanent civil service employees of the respondent Los Angeles County (P. 2-3). Said County employs approximately 20,000 like persons (P. 3).

Respondent Los Angeles County is a political subdivision of the State of California (P. 3), and the individual respondents are certain elected or appointed officers of the County (P. 3-4), including the elected members of the County Board of Supervisors (P. 3).

On April 1, 1947 the respondent members of the County Board of Supervisors directed the respondent County Chief Administrative Officer and the County Counsel to study, prepare and recommend ways and means of making an investigation "to determine whether or not there are any Communists, avowed or otherwise . . . employed by the County" (P. 4, par. IV; P. 16).

On August 15, 1947 these two respondents presented in writing to the Board of Supervisors a program of investigation which they recommended (P. 5, 16).

On August 26, 1947 the Board of Supervisors by its order adopted the said recommendations without change and ordered them put into operation (P. 5). It is this order which has been designated above as the Loyalty Order.

Under the Loyalty Order the respondent County Board of Supervisors directed and required a committee composed of the respondents County Chief Administrative Officer, County Sheriff, Secretary of the County Civil Service Commission and the County Counsel to institute and administer a program for the investigation of the loyalty of all County employees (P. 16-17), and report to the respondent Board of Supervisors "if any known subversively inclined persons are located with a recommendation by the committee in connection with each particular person in question" (P. 18, par. 8).

The provisions of the Loyalty Order "require" all County "officers and employees to execute" the Oath and Affidavit heretofore identified (P. 17, par. 5).

By paragraph "D" of the compulsory Oath and Affidavit petitioners and all other County employees are required to disclose whether they have ever "been a member of, or directly or indirectly supported or followed" (P. 20) any of the 144 named organizations and two named publications. The scope of the disclosure thus required is revealed by an examination of the listed organizations and publications which include among others the following (P. 20-25):

Named Publications; e.g.:

Daily Worker

New Masses

Named Veterans' Organizations; e.g.:
American Veterans Committee

Named Religious Organizations; e.g.:
Humanist Society of Friends

Named Labor Unions; e.g.
American Communications Association
Federation of Architects, Engineers, Chemists and Technicians
United Federal Workers
Workers Alliance
Marine Cooks and Stewards

Named Political Organizations; e.g.:
American Communist Party
Farmer Labor Party
Hollywood Independent Citizens Committee for Arts, Sciences and Professions
National Citizens Political Action Committee

Named Organizations Dealing with Foreign Affairs; e.g.:
American Committee for a Free Indonesia
Committee for Boycott Against Japanese Aggression
League Against War and Fascism
American Russian Institute
Anti-Nazi League
Joint Anti-Fascist Refugee Committee

Named Organizations Dealing with Civil Rights and Discrimination; e.g.:
American Committee for the Protection of the Foreign Born
Bay Area Council Against Discrimination
Civil Rights Congress
International Labor Defense
National Negro Council
National Federation for Constitutional Liberties

Named Organizations Dealing with Civic Affairs; e.g.:

Hold the Price Line Committee
League of Women Shoppers
Citizens Committee for Better Education

Named Schools; e.g.:

California Labor School
Communist Workers School

The organizations listed in paragraph "D" are described in the Loyalty Order as ones "known to be subversive or Communistic" or ones which "might have come under some subversive or Communistic influence" (P. 18, first paragraph).

Under paragraph "B" of the compulsory Oath and Affidavit petitioners and all other County employees are required to disclose whether they are now advocates of, or are now members of or have ever since December 7, 1941 been members of, "any political party or organization that advocates the overthrow of the Government of the United States, or State of California, or County of Los Angeles, by force and violence" (P. 19, par. "B").

Petitioners in their amended complaint sought an injunction prohibiting the respondent County and the several respondent officers thereof from requiring petitioners to execute the Oath and Affidavit and for declaratory relief* (P. 14-16). Petitioners sought the injunction and the declaratory judgment on the ground that the disclosures required by the Loyalty Order were contrary to the First and Fourteenth Amendments to the Constitution of the United States (P. 8, par. XII). As above stated, the trial court sustained the demurrer to the amended complaint without leave to amend (P. 34) and the court below affirmed (P. 47).

*Petitioners have not raised here denial below of relief against other aspects of the Loyalty Order.

Decisions Below—The Superior Court considered and rejected petitioners' claims that paragraphs "D" and "B" of the Oath and Affidavit violated their rights under "the provisions of the First and Fourteenth Amendments of the Federal Constitution" (P. 39, 43). That court relied on *United Public Workers v. Mitchell*, 330 U.S. 75, declaring that that decision had "answered these identical contentions" and had held adversely to them (P. 41).

The District Court of Appeal similarly considered and rejected petitioners' claims saying "there is nothing in the Oath or Affidavit which requires plaintiffs to surrender any constitutional right". (P. 56). It declared, "The mere asking of the question [as to whether petitioners could be compelled to make the disclosures required by the Loyalty Order] points unerringly to the answer any *loyal, sane* citizen of the United States of America would give to it. It is an unequivocal 'yes' ". (P. 49). The court supported its decision by stating that whenever a person accepts government employment "he impliedly surrenders certain natural rights which would remain his if he were a private citizen only just the same as he would surrender certain privileges if he were to enter private employment" (P. 51-52). And further that, since the Government of the United States had the right to draft persons for military service which may result in his loss of life, "any state in attempting to perpetuate its loyalty to the union has the unquestioned right and duty to exact from its citizens adherence to *all* lesser measures which have for their purpose the preservation of our form of government and the repression of its enemies". (P. 51). (Italics added.) The court concluded its opinion by adopting the opinion of the Superior Court. (P. 57).

Questions Presented

(1) Whether, on its face or as applied in this case, paragraph "D" of the Oath and Affidavit, prescribed in the Loyalty Order, which compels all county employees to disclose their membership in or direct or indirect support or following of any of 144 named organizations and two named publications deprives petitioners of the liberties of freedom of speech, press, religion, thought, association and assembly without due process of law in violation of the First and Fourteenth Amendments to the Constitution.

(2) Whether, on its face or as applied in this case, paragraph "B" of the Oath and Affidavit, prescribed in the Loyalty Order, similarly deprives petitioners of those liberties and rights without due process of law in violation of those amendments.

Summary of Argument

In the "Introduction: Statement of Premises" of this brief petitioners urge that the disclosures required under the Loyalty Order are directed at the exercise of at least these liberties protected by the First and Fourteenth Amendments: (a) freedom of opinion, since membership in or support or following of an organization imports acceptance of some or all of its program; (b) freedom of speech, since such a connection with an organization imports propagation of its cause; (c) freedom of assembly, since associations formed to propagate causes constitute a projection of the right of assembly; and (d) freedom of petition, in many instances, since it is often the function of associations formed around causes to appeal to government for redress of conceived grievances. It is further urged in the Introduction that the exercise of these liberties is of paramount importance to the continued vitality of free and representative government because they constitute the means whereby the people, as the ultimate repository of sovereignty, resolve their choice of men and

measures. The fullest freedom in the exercise of the liberties above described deserves the protetion of this Court not in the enforcement of private rights but in the safeguarding of our form of government.

Upon these premises petitioners urge that these liberties are offended here for the following reasons:

1. To the extent that the compulsory disclosures required by paragraph "D" of the Loyalty Order are directed at the holding or not holding by petitioners of opinions on the subjects indicated by the organizations enumerated therein, the Loyalty Order is void in principle as an inquisition into the citizen's opinions. Similarly, to the extent that such disclosures are directed simply at the advocacy of such causes, the Loyalty Order is void in principle as an inquisition into the exercise by the citizen of the freedoms of speech, assembly and association. It is such an inquiry because it is not predicated upon any of the exceptions to the operation of the First Amendment recognized by this Court, to-wit: defamation, obscenity, "fighting words", conduct defined under the clear and present danger rule, or matters of "time, place or manner".

2. If enforced, the compulsory disclosures prescribed in paragraph "D" of the Loyalty Order would coerce petitioners' freedom of choice respecting the opinions and causes indicated by the organizations enumerated therein by constraining them not to entertain or advocate those opinions and causes. This coercion would stem first from the fact that the County, as their employer, is positioned to visit economic reprisal upon petitioners in the event that it should disapprove of their disclosures, and second, because of the overhanging threat that the County will reveal publicly petitioners' disclosures under paragraph "D". The potential for coercion in each of these instances is aggravated by the fact that the County in the Loyalty Order has shown its hostility toward the organizations

listed by characterizing them as ones which are "subversive or Communistic" or ones which "might have come under some subversive or Communistic influence". This coercion, operating upon petitioners' freedom of choice as above stated, is an instrument for censorship of the content of petitioners' opinions and advocacy, similar to other instruments of censorship such as taxation, licensing and picketing statutes condemned by this Court. Were petitioners to be required to answer paragraph "D", the censorship would be effected as much, if not more, by the persuasive threat residing in the coercion above described as by the infliction of reprisal in specific cases.

3. The compulsory disclosures prescribed in paragraph "B" of the Loyalty Order invade petitioners' First Amendment liberties in similar respects and for similar reasons as those prescribed in paragraph "D". The inquiry as to advocacy of the overthrow of government by force and violence is not limited to advocacy under any specific set of facts or circumstances identifying it as conduct within the meaning of the clear and present danger rule. Absent these limitations, the inquiry is directed at speech protected by the First Amendment. So drawn it is void.

4. The compulsory disclosures prescribed by the Loyalty Order are not within the power of government simply because directed at public employees. The court below misconceived this Court's ruling in *United Public Workers v. Mitchell*, 330 U.S. 75, wherein this Court indicated that government regulation of its employees could not discriminate among employees on grounds of their opinions, advocacy or affiliation any more than it could on grounds of their race or color. By selecting the ideas, advocacy and association identified with only certain organizations as listed in paragraph "D", the Loyalty Order violates the principle enunciated by this Court in the *Mitchell* case. The standards of the Loyalty Order define no ob-

jective for County action in any way related to promoting the efficiency of the County Civil Service. These standards are loosely drawn and bereft of ascertainable meaning, thus permitting the County to abridge the constitutional freedoms heretofore set forth.

Introduction: Statement of Premises.

The constitutional validity of the Los Angeles County Loyalty Order turns upon the power of the County government to compel the disclosures briefly described in the Statement of Facts, *ante*, pp. 4-6. The validity of such a requirement can be examined, we submit, only with reference to certain basic assumptions dictated by the realities of human relationships in a democratic society and the nature of representative government. These are, *first*, that the inquiry into organizational connections prescribed in the County Loyalty Order is in fact a demand that the citizen render an accounting of his exercise of virtually the whole congeries of First Amendment liberties including particularly thought, speech and association, and, *second*, that the First Amendment liberties are primarily to be viewed as safeguards ensuring the fullest possible freedom to citizens in the performance of their sovereign functions in a free and responsible government.

A. The Compulsory Disclosures Commanded by the County Loyalty Order Are Specifically Directed at Petitioners' Exercise of the First Amendment Liberties.

By the oath and affidavit requirement of the Loyalty Order, the State of California, through its subdivision, the County of Los Angeles, has asserted the power to exact of petitioners and their 20,000 fellow employees an accounting under oath as to the manner in which they have exercised the innate liberties of a self-governing

people. It commands them to reveal, on pain of loss of employment, membership in or direct or indirect support or following of any of 144 named organizations and two named publications, along with membership in any political party or organization advocating the overthrow of government by force or violence. The disclosures thus compelled probe not simply into the exercise of the freedom of speech, but beyond that into the inner recesses of the citizen's convictions as well as into his association with his fellows in the advancement of his opinions.

The question, Have you ever been a member of or directly or indirectly supported or followed the "X" organization, is a searching probe into virtually the entire galaxy of liberties protected by the First Amendment. Membership in an organization imports an exercise of at least three, and in some instances a fourth, of these guarantees. First of all, it reflects acceptance of so much of the organization's program as to lead to participation in its affairs on a regularized basis. Thus the person who has become a member has by some process of ratiocination examined a set of ideas and to a greater or lesser extent accepted them as his own. He has exercised that First Amendment liberty which underlies all others and gives them direction and meaningful substance—freedom of thought or opinion. The question, Have you ever been a *member*, then, calls upon him who is interrogated to disclose his opinions past or present or both.[1]

Membership in an organization, further reflects an effort by the individual to express his opinions. The views

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[1]As was indicated in the Statement of Facts, *ante*, pp. 4-6, the opinions sought to be disclosed by the County Loyalty Order cover a wide range of human interest including religion, trade unions, politics, foreign affairs, racial discrimination, civil rights, and education.

of individuals normally have societal significance when they are expressed through association with others; they affect the processes of government when these organizations are sufficiently large and the dissemination of their programs sufficiently broad to be reflected in the votes of electors and their choice of representatives and measures. Organization of citizens around ideas, then, is but the effective exercise of the freedom of expression whether by speech or press, in their broadest sense, or both.

Membership in an organization, moreover, is but an exercise of the freedom of assembly and an extension of it to societal and governmental use. People assemble for the discussion of men or measures and this leads to the acceptance or rejection of ideas; the adoption of a program, whether it has the formal attributes of a Declaration of Rights or the informal aspect of a parent-teachers club. But this assembly and the program it evolves looks forward to efforts to advance and effectuate the views adopted. To this end some form of continuation organization is created. Again, this may have the complex form of a political party or a loose association subject merely to further call of an elected chairman. In any event it is a concretising of the temporary assembly for purposes of projecting its work into future efforts at dissemination of views and program. Association is simply assembly on a long term basis. Opposition to slavery, for example, was but a noble concept resting upon principles of human dignity and racial justice until the association of persons into the American Anti-Slavery Society led to an organization that swept the country carrying its message to every corner of the North and gathering to itself such large numbers of people that it became an identifiable

force in political parties, elected representatives to office and profoundly affected both the executive and legislative policies of the Lincoln, Johnson and Grant administrations. Significantly this association of individuals and the program it advanced has left an indelible mark upon American government and society in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.

Finally membership in an organization may well reflect an exercise of the right of petition. True it is not every organization that transmits its views to legislative bodies or executive officials. But in these days of complex social organization and extensively ramified government, both producing a situation wherein political parties do not and often cannot prepare a program sufficient to meet all needs of the period between elections many organizations convey the criticisms and aspirations of people to their representatives at all levels of government. In this they perform an important function in preserving the vitality of representative government. That many organizations do provide this link between citizen and government—and all may—demonstrates the importance of organized governmental interference with the freedom of citizens to associate.

Grave as such official thrusts at the exercise of democratic liberties are seen to be, the question, Have you ever directly or indirectly supported or followed "X" organization, effects a much deeper and more searching dissection of the processes protected by the First Amendment. The words "directly or indirectly supported or followed" defy precise definition. But in their very ambiguity they reach an important fact of political life in a democratic society. Political and other movements often attract in various degrees far more people than become full members. Millions

more voted for Franklin Roosevelt than those who registered as Democrats or became active participants in the party organization. Most movements framed to influence public opinion draw within their orbit those who act with it on single or separate issues, or who attend occasional meetings, or who donate money to some special campaign or effort, or who subscribe to its publications, or who advocate some or all of its program without ever taking out formal membership. In short, around most organizations there is a peripheral group, ever varying in numbers and interest which has assumed none of the obligations of membership but which on all or part of the organization's program, moves, albeit unevenly, in the same general direction as the organization itself. For the most part such peripheral adherents represent those whose thinking has not yet proceeded to settled views inducing them to make the programmatic commitments of membership. They are an inchoate ideological force still in the process of development.

The question designed to elicit direct or indirect support or following is directed to the disclosure of such adherence. It is calculated to reveal a tendency to move in a certain political or idealogical direction, a sensitivity to certain ideas, a willingness to take at least the first halting steps toward an integrated or comprehensive political program.

Here then the question is directed to the very intellectual processes upon which the exercise of all First Amendment liberties rests. The scalpel of the interrogator seeks to lay bare, not the structure of the citizen's philosophy, but the very nerve impulses as they activate his thought in the reach for any philosophy at all.

B. The Compulsory Disclosures Commanded by the County Loyalty Order Intrude Upon Petitioners' Exercise of the First Amendment Liberties as Governmental Functions of the People in a Self-Governing Society Which It Is the Purpose of the First and Fourteenth Amendments to Safeguard From Interference by the State.

The significance of the First and Fourteenth Amendments to the case at bar is their purpose to vouchsafe to the people their sovereignty over the state. We are concerned here not with private rights but with the safeguard of representative government. The very political system created by the Constitution can function only when the people are free to hold such opinions as reason and discussion show to be valid and to express individually and through association with like-minded persons the views they deem worthy of propagation and effectuation—only when they are relieved of all restraint in the intellectual processes of political speculation and the societal process of exchanging ideas. The liberties defined in these amendments are those "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern . . . society" (*Thornhill v. Alabama*, 310 U. S. 88, 103).

The sovereignty of the people in the American system of government has long been recognized by this court. Government both state and national was created by the people who delegated such powers as they deemed necessary to the federal government and others to the state governments, subordinated where appropriate the powers of the states to those of the nation and reserved to themselves "those sovereign authorities which they might not choose to delegate to either" (*Martin v. Hunter's Lessee*, 1 Wheat. 304, 324-325; *M'Culloch v. Maryland*, 4 Wheat.

316, 404-405).[2] The people are the "ultimate tribunal" to which, in the end, is the only appeal from the administration of government, and they may exercise their judgment "either in the pressure of opinion or by means of the suffrage" (*Yick Wo v. Hopkins*, 118 U. S. 356, 370).[3]

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[2]In assailing the Alien and Sedition Laws, Madison delineated the relationship of state and people in American representative government. Designed to choke off popular expression of the "alien isms" derived from the French Revolution, the Alien and Sedition laws provided a setting for Madison's exposition that gives it peculiar aptness to the current loyalty order programs designed to ferret out even thought about another ideology, also called alien:

> "The authority of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be kept in mind; and at no time like the present."—Madison's Report on the Virginia Resolutions, 4 Elliot's Debates, p. 550.
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> "The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitation of power. . . . the great and essential rights of the people are secured, not by laws paramount to prerogative, but by constitutions paramount to laws."—*Idem.*, p. 569.

Jefferson expressed it thus: "I know no safe depository of the ultimate powers of society but the people themselves . . ." Letter to William Charles Jarvis, September 8, 1820, Works Mem. Ed., Vol. 15, p. 278.

[3]"Let it be recollected, lastly, that the right of electing members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge and comparative merits and demerits of the candidates for public trust and on the equal freedom, consequently, of examining and discussing the merits and demerits of the candidates respectively."—Madison, Report on the Virginia Resolutions, 4 Elliot's Debates, p. 575.

In his letter to Elbridge Gerry, January 27, 1799, Jefferson described as "violations of the Constitution" governmental attempts "to silence by force and not by reason the complaints or criticisms, just or unjust, of our citizens against the conduct of their agent" (Works, Memorial Ed., Vol. 10, p. 78). Jefferson's letter to Colonel Edward Carrington, January 16, 1787, expounded a similar concept of the government's subordination to popular will and the necessity for full discussion and exchange of ideas. ". . . the basis of our governments being the opinion of the people, the very first object should be to keep that right [*i.e.*, free press]; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter" (Works, Memorial Ed., Vol. 6, p. 57).

". . . There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."—*West Virginia Board of Education v. Barnette*, 319 U. S. 624, 641.

The First and Fourteenth Amendments lay a specific prohibition against governmental action, federal or state, which is designed or calculated to influence the consent of the people by repressing ideas or abridging their dissemination. The freedoms thereby enunciated extend to "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" (*Thornhill v. Alabama* 310 U. S. 88, 102; see also *Grosjean v. American Press Company*, 297 U. S. 233, 249-250; Brandeis, J., concurring, *Whitney v. California*, 274 U. S. 357, 375-376). So completely dependent is free government upon free discussion that the amendments protect even speech which "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger" (*Terminiello v. City of Chicago*, 93 L. Ed. (Adv. Op.) 865, 868). In a free society there is no "watchman for truth" other than the people themselves; public authority is "foreclosed" from interference by regulation or prohibition either of speaker or his message (Mr. Justice Jackson concurring, *Thomas v. Collins*, 323 U. S. 516, 545-546).

The scope of the limitation upon government in the interest of the people's sovereignty effected by the First and Fourteenth Amendments has no mere abstract significance. It does not guarantee talk for its own sake. Rather

is it the means of preserving free government as we know it. Full freedom of thought and expression are conceived as the channels through which representative democracy can remain a vital force moving in the direction of needed change and ever greater human emancipation. To restrict such expression is to encourage "incitements to the overthrow of our institutions by force and violence." (*De Jonge v. Oregon*, 299 U. S. 353, 365; *Stromberg v. California*, 283 U. S. 359, 369; Brandeis, J., concurring, *Whitney v. California*, 274 U. S. 357, 375.)

The significance therefore of the County Loyalty Order is not only that it asserts a power denied to government. For all the reasons set out here and in the subdivisions below it asserts a power that is destructive of government as we know it. It is a bold reach by officialdom for the means of its own perpetuation. It is infected with the disease of the *status quo*, a form of political arthritis that atrophies every process whereby the state may adapt to the irrepressible necessities of social change.

POINT ONE

The Requirement of Paragraph "D" of the Oath and Affidavit Prescribed by the County Loyalty Order That Petitioners Disclose to the State Their Past or Present Membership in, or Direct or Indirect Support or Following of, 144 Named Organizations and Two Named Publications Is Void as a Matter of Principle in That It Exceeds the Powers of Government as Limited by the First and Fourteenth Amendments to the Constitution of the United States.

A. To the Extent That the Compulsory Disclosures Commanded by the County Loyalty Order Are Directed at the Exposure of Petitioners' OPINIONS as Such, They Are Beyond the Power of the State to Enforce and Destructive of Representative Government.

The lessons of history, as well as principle, demonstrate that, however men manifest their opinions, the opinions themselves are beyond the reach of the state. The struggle in America for what James Madison described as "free and responsible government,"[4] has always found its pivotal point in the effort to emancipate the minds of men in religious and secular matters from governmental control. Historically in America freedom of religious opinion and freedom of lay opinion have been integrated as a single concept, freedom of the mind, and as such has been the touchstone of civil liberty and democratic government. In the colonial period freedom of conscience was inseparable from political liberty[5] and the fight for

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[4]Report on the Virginia Resolutions, *supra*, Note 3.

[5]Up to the revolution all colonies except Rhode Island had some form of state interference with religious freedom, ranging from laws dealing with religious worship and heresy to established churches. Foote, *Thomas Jefferson, Champion of Religious Freedom* (Boston, 1947), pp. 25-30.

either necessarily involved both. Roger Williams' refusal to take the Oath of Fidelity was based upon the grounds that it required him to acknowledge the authority of the colonial government to prescribe religious orthodoxy, punish failure to comply with requirements of public worship and limit suffrage to church members.[6] Before Ann Hutchinson was banished she was first convicted, not of heresy, but of promoting opposition to the established oligarchy of churchmen. Her "crime" was having joined a "faction," critical of the teachings of the dominant ministers, which had threatened the political position of those in power and had presented a petition to the General Court on freedom of religion. This crime was denominated "dishonoring parents," and it was for this she was ordered banished before she was so much as charged with heresy.[7]

The American Revolution gave impetus to the concept that in matters of opinion man is answerable to no one and that the state is wholly without power to intrude. Madison wrote, ". . . the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men."[8] The reason for the lack of jurisdiction in the state to act at all in

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[6]Ernst, *Roger Williams, New England Firebrand* (New York, 1932), pp. 95-123; Brockunier, *The Irrepressible Democrat, Roger Williams* (New York, 1940), pp. 54-64.

[7]Mrs. Hutchinson's "faction" has been described as a "political party," and it had already deposed the colonial governor supported by the clerical oligarchy. Its criticisms of religious doctrines led to issues of political control reaching to the very foundations of the colonial government. The signers of the petition were later convicted of "seditious libel." See Adams, *Emancipation of Massachusetts* (New York, 1919), pp. 216-265; Howe, *The Puritan Republic* (Indianapolis, 1899), Chapter 10.

[8]"Memorial and Remonstrance Against Religious Assessments." II Writings of Madison, pp. 183 ff., set forth in full as an Appendix to the dissenting opinion in *Everson v. Board of Education*, 330 U. S. 1, 63 ff.

the area of conscience is found in the nature of representative government; when the Government exerts power here the sovereignty of the people is *pro tanto* destroyed:

> "Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the coordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The people who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves."
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> Madison's Memorial and Remonstrance, *supra*, quoted in 330 U. S. at p. 65.[9]

In his reply to the Danbury Baptist Association, Jefferson, then President, stated:

> "Believing with you that religion is a matter which lies solely between man and his God: that he

[9]Jefferson expressed the same concept in the preamble of his bill for establishing religious freedom. ". . . the opinions of men are not the object of civil government nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill-tendency is a dangerous fallacy which at once destroys all religious liberty . . . that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts. . . ." (Works, Mem. Ed., Vol. 2, pp. 300-303).

> owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof' . . . ."[10]

Concerning these words this Court has said:

> ". . . . Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."
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> *Reynolds v. United States*, 98 U. S. 145, 164.

Jefferson, during his presidency, asserted that the constitutional deprivation of all governmental power over opinion included the principle that the government had no "right of inquiry into the religious opinions of others." (Letter to Edward Dowse, 1803. Works. Mem. Ed., Vol. 10, p. 378.)[11]

To Jefferson, as to Madison, the protection afforded by the First Amendment to freedom of conscience in religious matters extended to secular matters as well, so as to defeat any power or jurisdiction whatsoever in the civil government:

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[10]Set out in the court's opinion in *Reynolds v. United States*, 98 U. S. 145, 164.

[11]See also letter to Dr. Benjamin Rush, April 21, 1803, Works, Mem. Ed., Vol 10, pp. 380-381; letter to Dr. Benjamin Rush, September 23, 1800, Works, Mem. Ed., Vol. 10, p. 175; letter to Mrs. M. Harrison Smith, August [illegible], 1816, Works, Mem. Ed., Vol. 15, p. 60.

". . . another and more special provision has been made by one of the amendments to the Constitution which expressly declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press,' thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch that whatever violates either throws down the sanctuary which covers the others—and that libels, falsehoods, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals . . ."[12]

Madison regarded "free and responsible government" so utterly dependent on free opinion and expression that he without reservation denied any power in government to censure the opinions and associations of men. In the Congressional debate on the censure of the "democratic societies" in the autumn of 1794[13] he delineated the subordination of government to the people to demonstrate that Congress was without power to pass the censure:

"When the people have formed a constitution, they retain those rights which they have not expressly delegated. It is a question whether what is thus retained can be legislated upon. *Opinions are not the*

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[12]Kentucky Resolutions of 1798 and 1799. 4 Elliot's Debates 540. The reference to "libels, falsehoods and defamation" is to the prohibitions in the Alien and Sedition Laws against publications and speech which were "false, scandalous and malicious . . . against the government of the United States . . . with an intent to defame . . ." (The text of this provision is set out in 4 Elliot's Debates p. 573.) The Resolutions were written in opposition to those acts.

In his First Inaugural Address Jefferson pleaded for the elimination of "political intolerance" equally with "religious intolerance" for the reason that both were destructive of free and representative government (Works, Mem. Ed., Vol. 3, pp. 318-9).

[13]See *infra*, pp. 30-31.

objects of legislation. You animadvert on the abuse of reserved rights. . . . It may extend to the liberty of speech, or of the press. . . . . *If we advert to the nature of Republican Government in general, we shall find that the censorial power is in the people over the government and not in the government over the people.*"[14] (Emphasis added.)

It is in the light of this history that this Court has held that political belief along with religious belief has an "absolute" protection from governmental interference because "essential to enlightened opinion and right conduct on the part of the citizens of a democracy" (*Cantwell v. Connecticut*, 310 U. S. 296, 304, 310).

The interrelation of the First Amendment guarantees was purposeful because history has demonstrated that without freedom of religious opinion there is no freedom of political opinion, as well as the converse, and both are essential to the maintenance of our representative government:

". . . . It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, *cf.* De Jonge v. Oregon, 299 U. S. 353, 364, 81 L. ed. 278, 283, 57 S. Ct. 255, and therefore are united in the First Articles assurance. *Cf.* 1 Annals of Congress 759, 760.

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[14]Ann. Cong., 3d Cong., 1st and 2d Sess., p. 934. Giles spoke in a similar vein, ". . . . the public have a right to censure us and we have *not* a right to censure them . . . . We are neither authorized by the Constitution, nor paid by the citizens of the United States for assuming the office of censorship" (Ann. Cong., *supra*, p. 917).

This conjunction of liberties is not peculiar to religious activity and institutions alone. *The first amendment gives freedom of mind the same security as freedom of conscience. Cf.* Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A. L. R. 468; Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A. L. R. 1446; Prince v. Massachusetts, 321 U. S. 158, 88 L. ed. 645, 64 S. Ct. 438. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." (Emphasis added.)

Thomas v. Collins, 323 U. S. 516, 530-531.[15]

California's command that petitioners reveal their past or present membership in or direct or indirect support or following of named organizations and publications is patently designed to disclose their opinions in both religious[16] and secular fields. Even as to those who have had no connection with the organizations and publications the Loyalty Order requires a disclosure—that of negativing the opinions under inquiry. The investigation requires the petitioners to disclose beliefs or the absence of them, and, in either case, a state of mind. For that which is in

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[15]See also Mr. Justice Jackson's penetrating formulation: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. . . . *As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy.*" (Concurring opinion, *Thomas v. Collins,* 323 U. S. 545-546.) (Emphasis added.)

[16]The list of organizations in paragraph "D," it will be recalled, includes the Humanist Society of Friends.

their minds they are accountable to no one, the more especially not to government for the power in government to be the guardian of the citizen's mind has in these United States been irrevocably denied. While this Court sits "free and responsible government" cannot be undermined by official attrition of the consent upon which it rests.

B. To the Extent That the Compulsory Disclosures Commanded by the County Loyalty Order Are Directed at the Exposure of the ASSOCIATION of Petitioners for the Propagation of Opinions by Speech, Assembly and Petition, They Are Beyond the Power of the State to Enforce and Destructive of Representative Government.

Insofar as the County Loyalty Order requires the disclosure of the association of petitioners for the propagation of opinion, it is as void on principle as the requirement that petitioners disclose their opinions. The right to propagate opinion is as absolute as the right to hold opinion itself, save in limited exceptions none of which obtain here. Thus, the Loyalty Order is not an effort to redress private injury caused by defamation. It is not a regulation holding to account the user of "fighting words" or obscenity. (See *Chaplinsky v. New Hampshire*, 315 U. S. 568, 573.) Nor does it seek to prescribe the time, place or manner of the exercise of speech or assembly in the interests of ordered liberty. (See *Kovacs v. Cooper*, 93 L. Ed. (Adv. Op.) 379.) Finally the inquisition into expression in the manner prescribed here is in no sense an effort to reach to conduct of any kind. (See *Reynolds v. United States*, 98 U. S. 145; *Bridges v. California*, 314 U. S. 252, 263; *Thornhill v. Alabama*, 310 U. S. 88, 104-105.) In fine, the Loyalty Order is purposed to reveal the simple fact of expression, nothing more. Expression not

falling within the exceptions indicated above is as fully protected as opinion.

As was pointed out in the Introduction (*ante*, p. 11 ff) membership, or a more remote participation, in organizations formed for the propagation of ideas is but the exercise of freedom of speech. The essence of that liberty is propagation of opinion through any medium. It protects not only the individual speaker, whether on the soap box or at the lectern, but also the joint efforts of individuals to promote ideas and programs through association. In the political field especially has it been recognized that association is essential to the significant expression and dissemination of principles and position. It is the conduit to the effectuation of political program in both the electoral process itself as well as in the process of petition to representatives once elected. The right stems from the practices of history and the necessities of free men.

It is no exaggeration to say that American independence came into being through the propagandizing work of private individuals organized as the Committees of Correspondence. And it was this history that shaped the First Amendment as a limitation upon the power of government to interfere with such a method of free expression. An organizational form having its origin deep in colonial history,[17] the Committees of Correspondence became a "medium of self-expression and action,"[18] having the greatest

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[17]See *History of the State of New York* (Edited by A. C. Fleck, Columbia University Press, 1933), Vol. III, pp. 212-216; Leake, *The Virginia Committee System and the American Revolution* (John Hopkins University Studies in History and Political Science) *passim*; Collins, *Committees of Correspondence of the American Revolution* (Annual Report of the American Historical Association for 1901), Vol. I, *passim*.

[18]*History of the State of New York, supra*, p. 230; Davidson, *Propaganda and the American Revolution* (Univ. North Carolina Press, 1941), Chaps. 3 and 4; Van Tyne, *The American Revolution* (Vol. IX of *The American Nation: A History*, edited by A. E. Hart), pp. 21 ff.

importance in the moulding of the colonists' resistance to imperial encroachments upon representative government. Their purpose was epitomized in the words of Samuel Adams before the Boston Town Meeting in 1772, moving for the creation of the Boston Committee, "to state the rights of the Colonists, and of this Province in particular, as men and as Christians and as subjects; and to communicate and publish the same to the several towns and to the world, as the sense of this town, with the infringements and violations thereof that have been, or from time to time may be, made.[19] They formulated and mobilized opposition to the Stamp Act which imposed taxes by a legislative body in which the tax payers were not represented,[20] the decree fixing the salary of judges and providing the necessary revenue from a tax levied upon the colonists;[21] the importation of tea subject to duties levied from abroad.[22]

Moreover it was from within the committees that the idea of the Continental Congresses sprang, and they largely consisted of representatives selected through the local

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[19]Boston Town Records for November, 1772; Wells, *The Life and Public Services of Samuel Adams* (Little, Brown & Co., Boston, 1866), Vol. 1, pp. 485-497; Collins, *Committees of Correspondence of the American Revolution, supra*, pp. 247-249.

[20]*History of the State of New York, supra*, pp. 214-219. Of the work of the committees up to the repeal of the importation duties the author says:

> "They had created and organized popular sentiment, directing it against the objectionable measures of Parliament by newspaper publicity [i.e., in the form of letters to newspapers] and mass meetings. By correspondence they had kept in touch with the committees of other colonies for the promotion of concerted action in the common interest." (p. 219.)

[21]See note 19, *supra*.

[22]Wells, *supra*, Vol. 2, pp. 108-130, 156-196; *History of the State of New York, supra*, pp. 222-225; Collins, *supra*, pp. 258-259.

committees set up over all the colonies.[33] From local committees the message of representative government had been carried to all the land, and that which had been created as an organ for the transmission of information became the force that welded the entire American seaboard to the point where, acting in unison, it could declare itself an independent nation and create its own government on the principles urged from the beginning.

It is with an eye to such fruition of liberty by the association of free men to advance a cause that all government in the United States has submitted to the prohibitions of the First and Fourteenth Amendments.

The lessons of the revolution were not so dim in the memory of those who framed our Constitution that they purposed to vouchsafe free speech to the individual acting alone but not when acting collectively. In 1794 the Federalists in Congress attempted to have adopted a Congressional censure of the "democratic societies" which had sprung up preaching the egalitarian doctrines of the French Revolution and denouncing the courtly pretensions of the Federalist administration. In the House of Representatives Madison and Giles led the opposition to the Federalist censure and succeeded in having it defeated.

Madison argued that these societies represented merely the efforts of men to express and advance their views and that to censure them was to censure the freedom of speech and press; that "opinions are not the subject of legislation" and that the advocacy of the societies must be per-

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[33]Wells, *supra*, Vol. II, p. 91; *Collins, supra*, pp. 256-262; *History of the State of New York, supra*, pp. 228-231; Van Tyne, *The Causes of the War of Independence, supra*, pp. 427-428; McLaughlin, *A Constitutional History of the United States*, p. 83.

mitted to "stand or fall by public opinion."[24] Giles held that in opposing the censure of the societies he and Madison were opposing "the very first step made in America to curb public opinion."[25] All who participated in the debate conceded the right of citizens to form societies for the advancement of their views.[26]

The story of the Abolitionists marks out with awesome vividness the content of the First Amendment guarantees as well as the consequences of ignoring them. The American Anti-Slavery Society, formed to attain the abolition of slavery "only through the power of the truth applied to the understanding and conscience of the slaveholders, to persuade them to do their duty,"[27] carried its message to the entire nation through the association of individuals for the propagation of an idea.

Southern efforts to silence the cause of the black man's freedom repressed anti-slavery societies, as well as all other forms of advocacy of emancipation below the Mason and

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[24]The censure was to be included in a message from the House to the President in reply to the latter's which had criticized the societies. Rives, *Life of Madison* (Boston, 1859), Vol. 3, pp. 464-469; Ann. Cong., 3d Cong., 1st and 2d Sess., 1793-1795, pp. 934-935.

[25]Ann. Cong., *supra*, p. 919. Jefferson, writing to Madison, commented, "It is wonderful indeed, that the President should have permitted himself to be the organ of such an attack on the freedom of discussion, the freedom of writing, printing, publishing . . ." (Letter to Madison December 28, 1794, Works, Memorial Ed., Vol. 9, p. 293.)

[26]As one of the proponents of the censure put it, "The right to form political clubs has been urged, as if it had been denied." Ann. Cong., *supra*, p. 922. See also, p. 906.

[27]Letter of James G. Birney, "A Vindication of Abolitionists," included in *A Collection of Valuable Documents* (Isaac Knapp Co., 1836).

Dixon line.[28] Legislation was offered in Congress at the instance of President Jackson in 1835[29] to deny the use of the mails for the circulation of abolitionist literature. It was defeated in the Senate, its opponents calling attention to the constitutional guarantees preventing a "gag in the mouths of our citizens" and forbidding that we "put down societies who meet" to discuss slavery. "Should Congress, by the exercise of its power attempt to prevent us from speaking, writing, printing, publishing and forming societies, for the exercise of all our moral powers in order to induce the members of our sister states to refrain from . . . [slavery] . . . ? . . . a plain exposition of . . . [this thesis] . . . is its best refutation."[30]

The legislatures of the Southern states, in the period 1835 to 1836, memorialized every Northern state urging the adoption of legislation to suppress the anti-slavery societies as well as forbidding the publication and dissemination of abolitionist literature.[31] Proposed legislation to

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[28]The suppression took the form of laws forbidding circulation of or subscription to Abolitionist literature, official as well as private offers of rewards on the heads of Abolitionist leaders, vigilante terror including lynchings, brandings, whippings and raids upon federal post offices for the removal and burning of Abolitionist literature, all tolerated by authorities. See Cutler, *Lynch Law: An Investigation into the History of Lynching in the United States* (New York, 1905), p. 124, and Chap. IV, *passim*; William Birney, *James G. Birney and His Times* (New York, 1890), pp. 184 ff.; *Third Annual Report of the American Anti-Slavery Society* (William S. Dorr & Co., 1836), pp. 42-46, 49; Goodell, *Slavery and Anti-Slavery* (New York, 1852), pp. 410-411; Wilson, *History of the Rise of the Slave Power in America* (New York, 7th Ed.), Vol. I, pp. 186 ff., 670.

[29]*Congressional Globe*, 24th Cong., 1st Sess., p. 10.

[30]Remarks of Senator Thomas Morris (Ohio), April 14, 1836, *Congressional Globe, supra*, App. pp. 282-283.

[31]Birney, *supra*, p. 190; Senate Document No. 124, 24th Cong., 1st Sess., 1835-1836; Goodell, *Slavery and Anti-Slavery* (New York, 1852, pp. 413-414; Macy, *The Anti-Slavery Crusade* (Vol. 28 of *The Chronicle of America*, edited by Allen Johnson), Chap. 15; Wilson, *History of the Rise and Fall of the Slave Power in American* (Houghton, Mifflin & Co., 7th Ed.), Vol. 1, Chap. 24; *Third Annual Report of the American Anti-Slavery Society, supra.*

these ends was fought and defeated in every state legislature where introduced on the grounds that the societies and their publications constituted the propagation of opinions with which, by virtue of the guarantees of free speech, government was powerless to interfere.[82]

This history is pregnant with the meaning of the First Amendment. In it is the recognition in practice of the vital connection between propagation of a cause and the freedom to form associations to that end. The hand of government was stayed that such societies might have the full protection of the First Amendment and its counterpart in state Constitutions, and that the processes of representative government might function in full vigor to solve the critically important as well as the superficial problems of society.

Significantly also does this history point to the price of ignoring the command of the First Amendment. The repression of advocacy of abolitionism in the South prevented that full exchange of opinion which representative government requires for the peaceful adoption of change. It is therefore not too much to claim that Southern repression irretrievably committed the resolution of the slavery question to the forum of force.[83]

True to this history has been the decisions of this Court applying the protection of the First Amendment to the right of individuals to form associations for the propa-

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[82]Birney, *supra*, pp. 201, 233-237; Goodell, *supra*, note 31, pp. 418-419; Macy, *supra*, note 31; Wilson, *supra*, note 31; Third *Annual Report*, *supra*, note 28.

[83]*Cf.* the observation of this Court in *De Jonge v. Oregon*, 299 U. S. 353, 364. In the North, on the other hand, the continued advance of abolitionist advocacy led to the formation of political organizations which finally became part of the Republican Party in 1856. Calhoun predicted this as a reason for repression (*Congressional Globe*, *supra*, p. 10.)

gation of causes. Whether it be for religious causes or secular ones the citizen's right to "adhere" to such organization as he chooses is protected, and the Fourteenth Amendment stands as a bar to State action in the same measure as the First stands against Federal intrusion. (*Cantwell v. Connecticut*, 310 U. S. 296, 303; *Thomas v. Collins*, 323 U. S. 516, 539.) Association in political parties has been recognized as necessary to the operation of a republican form of government constituting as they do the effort of the individual to propagate and promote his views on public affairs (*Ex Parte Curtis*, 106 U. S. 371, 375, see also dissent, 106 U. S. at pp. 376-377), and such association as well as activities in furtherance of its aims are an exercise of the rights reserved to the people under the Ninth and Tenth Amendments (*United Public Workers v. Mitchell*, 300 U. S. 75, 94).

> "One of the chief reasons for freedom of the press is to insure freedom, on the part of individuals and associations of individuals at least, of political discussion of men and measures, in order that the electorate at the polls may express the genuine and informed will of the people. Brandeis, J., in Whitney v. People of State of California, 274 U. S. 357, 375, 47 S. Ct. 641, 71 L. Ed. 1095; Hughes, C. J., in Stromberg v. People of State of California, 283 U. S. 359, 369, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A. L. R. 1484. Individuals seldom impress their views upon the electorate without organization. They have a right to organize into parties, and even into what are called 'pressure groups,' for the purpose of advancing causes in which they believe. They have a right to engage in printing and circulating their views, and in

advocating their cause in public assemblies and over the radio."

Bowe v. Commonwealth, 320 Mass. 230, 252, 69 N. E. 2d 115, 167, 167 A. L. R. 1447, 1463-1464.

As was pointed out in *Thomas v. Collins*, 323 U. S. pages 530-531, it was no coincidence that the "cognate" rights of assembly and petition are conjoined with those of speech and press. They protect not simply the right to speak but to speak with a voice as strong as the adherence of the convinced will permit. The security thus given is, like its correlatives of speech and press, both the lifeblood and the protection of representative government.[24]

[24]"It is difficult in the light of history to see that anything has been gained in the long run by multiplying prohibitions upon the right of association. Where men feel passionately upon some object they will combine to promote it; and any prohibition upon their effort to do so only serves to drive their activities into secret channels where their discovery is more difficult. It may well be argued, for example, that much of the violence of the French and Russian history in the nineteenth century was due to exaggerated suppression of the right to form political associations; for men who cannot persuade a government to accept their view will seek sooner or later to impose it upon that government. Prohibitions did not seem to have any long run effect save that of exacerbating the temper of the disputants."—*Encyclopaedia of the Social Sciences*, Vol. VI, p. 449, "Freedom of Association" (Harold J. Laski).

POINT TWO

The Compulsory Disclosures Required by Paragraph "D" of the Oath and Affidavit Prescribed in the County Loyalty Order Constitute Restraint and Coercion by the State of Petitioners in Their Free Choice of Opinions and Associations and Their Advocacy of Ideas, Censor the Same and Thereby Usurp Pro Tanto the Sovereignty of the People.

In Point I, *ante*, petitioners urged that, since the compulsory disclosure requirement prescribed in paragraph "D" of the Loyalty Order injects the State into the area of ideas and their propagation, the Order is invalid as a matter of principle. This branch of the argument is devoted to showing that, having entered the area of opinion and advocacy, the State is exercising, through the Loyalty Order, its power to constrain petitioners not to hold or not to advocate named ideas.

A. The Compulsory Disclosures required by the Loyalty Order Effect a Restraint and Coercion upon Petitioners to Avoid or Abjure Named Ideas and Advocacy.

The restraint and coercion operating upon petitioners by virtue of being forced to make the disclosures prescribed in paragraph "D" come from two sources: *First*, from fear of economic reprisal by the County as petitioners' employer; and *second*, from fear of social and other reprisal by the public at large, which might be set in motion by disclosure to the public by the County of the matters demanded of petitioners.

As petitioners' employer the County is positioned economically to disadvantage or penalize petitioners in manifold ways, direct and indirect. It brandishes power in the ultimate to end their means of livelihood and to

interrupt, if not destroy, their careers. In such premises economic coercion would attend any inquiry by the County into the organizational activities of its employees even were the inquiry non-selective and unattended by indications of hostility.[35] But here the County seeks disclosure respecting connection with specifically named organizations selected by it, and concerning those organizations it has expressed a value judgment making them plainly suspect. On the face of the Loyalty Order itself, the County has characterized the organizations listed under paragraph "D" as being in every case either an organization "known to be subversive or Communistic" or an organization which may "have come under some subversive or Communistic influence" (P. 18, first paragraph). The County further states in the Loyalty Order that it requires the disclosures of connection with such suspect organizations as part of a program of determining "whether or not there are any Communists, avowed or otherwise . . . employed by the County of Los Angeles" (P. 16), to the avowed end of "ferreting out Communism" (P. 18).

The restraint and coercion arising from fear of public opinion stems from the threat, apparent on the face of the Loyalty Order, that the County may publicly disclose the information respecting individuals obtained through the Oath and Affidavit. While the committee administering the Loyalty program is required to keep this information "confidential" during its investigation, it becomes public at the point where the committee reports to the

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[35]By this we do not mean to cast the slightest implication that such a non-discriminating inquiry would be constitutionally proper. We distinguish it to show that the restraint and coercion effected by the County Loyalty Order as drafted is specific and therefore the more gross.

Board of Supervisors, as it is required to do, its discovery of "any known subversively inclined persons" (P. 18, paragraphs 6 and 8). Such public exposure would set in motion all of the moral, social and economic reprisals that intolerant majorities have historically vented upon the outnumbered advocates of dissidence and causes with little following.[88]

In both respects the restraint and coercion operates to affect those who have already made a choice as to any of the causes indicated in paragraph "D" and those who have not. The former will be constrained to abandon their

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[88]The County here would not only precipitate the social reprisal but would contribute to its severity by virtue of the value judgment previously described. Also contributing to the hostility of public opinion toward the listed organizations are the characterizations of them by the California Legislative Committee referred to in the Loyalty Order. A check of these organizations against the references to the Legislative Committee's reports given in the Loyalty Order, and against the Committee's 1948 Report shows that of the 144 organizations, 129 were described as "Communist dominated" or "Communist front" organizations, 10 as connected with Fascist movements, 1 with no apparent connection (Humanist Society of Friends, P. 23), and 4 could not be found in the Reports at all. (See *Un-American Activities in California, Report of the Joint Fact-Finding Committee to the 55th California Legislature*, 1943, *passim*; *Third Report, Un-American Activities in California, Report of the Joint Fact-Finding Committee on Un-American Activities to the 57th California Legislature*, 1947, *passim*; *Fourth Report, Un-American Activities in California, Report of the Joint Fact-Finding Committee to the 1948 Regular California Legislature*, 1948, "Communist Front Organizations," *passim*. The Legislative Committee has charged that the organizations it labels as "Communist dominated" or "Communist front" are participants in a "criminal conspiracy." (1948 Report, p. 93.) The denunciation of the organizations has been official in nature and broadcast statewide. Such functions the Committee apparently conceived to be the use of "the glaring light of publicity" (1943 Report, p. 383), and the technique of "investigation and exposure." (1948 Report, pp. 677 ff.) The Committee has cited a public opinion survey, indicating that 55% of the sample interrogated had heard of the Committee's work. (*Fifth Report of the Senate Fact-Finding Committee on Un-American Activities*, 1949, p. 685.)

choice or at best persist in it in the face of the County's disapproval. The latter will be influenced to reject such causes. Both will feel pressure to seek only choices which will meet the County's test of acceptability.

Wherever it has served the interest of society to preserve freedom of choice, the law has protected those who exercise it from being forced to disclose their choice to, or suffer its apprehension by, others situated to cause or inflict any form of reprisal.

(1) Restraint and Coercion Through Compulsory Disclosure of Trade Union Opinion and Association.

Under the National Labor Relations Act, as amended, (29 U. S. C. A. 151 ff) employees in private industry affecting commerce are secured freedom of choice in self organization.[37] From the earliest days of the enforcement of this statute it has been uniformly recognized that inquiry by an employer into the union views or affiliations of his employees is necessarily coercive and therefore destructive of their independent choice of a collective bargaining representative. This, because the employer has the power to attach to his disapproval of the disclosure obtained, consequences adverse to the employee. The National Labor Relations Board has from the beginning condemned such interrogations as "flagrant intimidation and coercion of the . . . employees" (*Re Greensboro Lumber Co.*, 1 N. L. R. B. 629, 632) and "*per se* violative

[37]The Act of course neither grants nor creates private rights but rather provides protection for the exercise of the "fundamental" right of association vouchsafed to all citizens. (*NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Thomas v. Collins*, 323 U. S. 516, 533-534.)

of the Act." (*In Re Newman Machine Co.*, 74 N. L. R. B. 220, 221, note 3, 20 L. R. R. M. 1167, 1168.)[28]

This court has upheld the conclusions of the Board as to the coercive effect of inquiry by employers into the union views or affiliations of their employees. (*H. J. Heinz Co. v. NLRB*, 311 U. S. 514, 518, wherein the illegal conduct included "questioning employees concerning their labor union sympathies" by two representatives of the employer.) In *NLRB v. Times-Picayune Publishing Co.*, 5 Cir., 130 F. 2d 257, 258, similar conduct was characterized as intermeddling "with regard to unfettered self-organization." (See also *NLRB v. Norfolk Southern Bus Corp.*, 4 Cir., 159 F. 2d 516, 518, cert. den. 330 U. S. 844.)

(2) Restraint and Coercion Through Forced Disclosure of Religious Opinion or Affiliation.

(a) *Disclosure Through the Released School Time Program, Illinois ex rel. McCollum v. Board of Education.*

In *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, this Court struck down the "released time" religious training program theretofore in effect in Illinois grade and junior high schools. One of the features of the state program recognized by that decision to be destructive of free choice in the area of religion was compelled public disclosure of minority opinion which exposed the children adhering thereto to social pressure by majority groups. In that case the school children

[28]The Board similarly condemns employer coercion through employment application forms calling for disclosure of either the fact of union affiliation or the nature of it. (See NLRB *Seventh Annual Report*, 1942, p. 44.)

were required once each week to separate themselves into groups to attend different classrooms, there to receive religious training from volunteer teachers appearing for various religious creeds. There was no state compulsion favoring attendance at any particular class and there was no affirmative discrimination against any creed, all being free to participate equally. However, those pupils not choosing to attend one or another of the religious classes afforded by participating creeds were required to assemble in yet another classroom to continue secular study. Thus, by process of compelled choices and elimination, the children of non-participating creeds together with children accepting no creed at all were made known to their fellows and were thereby exposed to social pressure and coercion tending to influence them to adopt conforming majority ideas. This Court observed that the state program rendered the religious creeds participating in the program "an invaluable aid in that it helps to provide pupils for their religious classes." (See 333 U. S. 212.) The program was held unconstitutional as a violation of the neutrality required of the state in the area of religious thought.

In his concurring opinion, Mr. Justice Frankfurter made this point particularly plain. He observed that the Constitution in the area of religious thought prohibits "coercion however subtly exercised" and that the Illinois program contained "powerful elements of inherent pressure" not removed by the treatment of all sects equally by the school authorities.

> ". . . That a child is offered an alternative may reduce his constraint; it does not eliminate the operation of influence by the school in matters sacred

to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. Those are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages."—*Illinois ex rel. McCollum v. Board of Education*, 333 U. S. pp. 227, 228.

The coercion upon petitioners' freedom of choice far exceeds in nature and degree that in the *McCollum* case. First, the more significant coercion here involves intimidation by an employer able to destroy petitioners' economic security, a factor wholly absent in the *McCollum* case. Second, the compulsion there was the pressure of others set in motion by the state. But here the state is not merely positioned to set in motion the hostile opinion

of the community by exposing individuals as involuntary targets thereof, but additionally has aggravated the hostility by its own acts as previously related.

(b) *Restraint and Coercion by Means of Disclosure Through Payment of Taxes to "Christian Societies" Designated by the Taxpayer; the Virginia Bill for the Support of Religious Teachers.*

The *McCollum* case is consistent with a powerful precedent in our constitutional history, the reasoning of Madison's Remonstrance against the Virginia bill of 1784 for religious assessments.[39] The bill levied a tax on all Virginia residents "for the support of Christian teachers." Each taxpayer was permitted to direct the payment of his tax to any "society of Christians" he might choose, and the taxes of those making no such designation were to be placed in the public treasury for use in "the encouragement of seminaries of learning." It required that the sheriff of each county return annually upon oath the names of the taxpayers in each county, the amount of the tax paid and the society designated by each. He was to list separately those who designated no society. Copies of his lists were to be filed with the county clerk and publicly posted "for the inspection of all concerned." (See 330 U. S. at pp. 73-74.)

In circumstances closely parallel to the case at bar, and the *McCollum* case, the bill would have compelled disclosure by all citizens of their religious opinions and

[39] The text of the Remonstrance and of the bill against which it was directed are set out in an Appendix and Supplemental Appendix, respectively, to the dissent in *Everson v. Board of Education*, 330 U. S. 1, 63, 72.

affiliations or the absence thereof. While the disclosure would have been made to an agent of government, he was required to make it public. By operation of the bill the conscience of the citizen would have been exposed to the pressures of public intolerance.

Madison sharply perceived the coercive effect of such disclosure and its bloody parentage:

> ". . . What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance."—Madison's Remonstrance, quoted in 330 U. S. pp. 68-69.

The authorities here reviewed render inescapable that which reason alone makes plain—that the disclosures compelled by the County Loyalty Order are coercive. The *NLRA* cases are indistinguishable in fact and in principle. Moreover, they point to a factor of coercion present in the instant case which is in addition to the pressure of public opinion found in the *McCollum* case and the Virginia bill. In short, in these precedents coercion was found on the basis of either of two factors both of which obtain in the case at bar. There is coercion in the instant case if coercion is not to be wholly redefined as a legal concept.

B. Since the Restraint and Coercion Effected Upon Petitioners Through the Disclosures Required in Paragraph "D" of the Loyalty Order Operates Upon Their Choice of Ideas and Advocacy in the Exercise of Their Sovereign Powers as Citizens, They Constitute Governmental Censorship of Thought and Speech Amounting to Usurpation of the People's Authority.

The effect of the compulsory disclosure requirement of the Loyalty order, being coercive upon belief of association, is by that token censorship. It is directed at influencing the content of men's thoughts and affiliations. It is an assumption by the state of "a guardianship of the public mind."[40] This censorship, going to those matters needful "to enable the members of society to cope with the exigencies of their period,"[41] strikes at the very sinews of representative government. It is a usurpation of popular sovereignty.

Involved here are fundamentals which have guided and controlled decisions by this Court in speech and religion cases in widely varying fact situations—indeed, fundamentals which may be said to be implicit if not explicit in every speech or religious decision in this Court's reports. They are these: in the area of speech and ideas, government may not censor; it may not discriminate; it may not advantage or disadvantage any idea in its free competition for acceptance by the people; it may regulate the "time, place or manner" of public debate, but it may not regulate the content of the ideas which may be so debated nor say what speakers may engage therein; it may never be a participant in the market place of opinion even

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[40]Mr. Justice Jackson, concurring, *Thomas v. Collins*, 323 U. S. 516, 545.

[41]*Thornhill v. Alabama*, 310 U. S. 88, 102.

in the guise of maintaining public order. Government under the American concept of state has no right to intrude itself into the content of the debate or to seek to control or influence its end conclusions, for otherwise the people's agent would have power to supervise its own commission.

In *Schneider v. Irvington*, 308 U. S. 147, 164, this Court expressed the concept in these words:

> "Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

As Mr. Justice Frankfurter put it in *Kovacs v. Cooper*, 93 L. Ed. (Adv. Op.) 379, 391, government may in the exercise of its power over the time, place and manner of exercising speech, regulate the volume of noise produced by sound trucks but it may not "prescribe what ideas may be noisily expressed." (See also Mr. Justice Jackson concurring, *Terminiello v. City of Chicago*, 93 L. Ed. (Adv. Op.) 865, 877-878, 883; first *Opelika* case, 316 U. S. 584, 595-596.)

These barriers confront government wherever and however its actions impinge upon speech or religion. The form of the state action is of no concern. These theses—no censorship, no reserving of discretion to discriminate among ideas or speakers, equal rules for all speakers and all ideas, and a right in each and all to speak for any idea so long as the time and manner be appropriate—these basic rules run through cases governing such diverse types and forms of state action as the following: taxation (*Murdock v. Pennsylvania*, 319 U. S. 105; *Jones v. Opelika*, 319 U. S. 103); licensing (*Cantwell v. Connecticut*, 310 U. S. 296; *Largent v. Texas*, 318 U. S. 418; *Lovell v. Griffin*, 303 U. S. 444); a criminal statute outlawing peaceful picketing of a place of business "without a just cause or legal excuse" (*Thornhill v. Alabama*, 310 U. S. 88); and a statutory scheme for injunctive "abatement" of newspapers as nuisances (*Near v. Minnesota*, 283 U. S. 697).[42]

Government, then, is prohibited from undertaking any action, whatever its form, which is censorious or discriminatory in its operation on the free interchange of ideas. By no method may it seek to influence or control the ideas which the people may adopt. It may not disadvantage or advantage one idea in even the smallest way for it has *no* right to influence the contents of private choice by any citizen.

The County violates these principles by the Loyalty Order presented here. By the very act of compelling any

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[42]Even in the field of regulating radio channels where, for limitation in the number of wave lengths, the government must reject some applicants for channels, it cannot "choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis." *National Broadcasting Co. v. United States*, 319 U. S. 190, 226.

disclosure of petitioners' opinions or advocacy the County would position itself to unleash against petitioners its powers as their employer as well as the pressure of public opinion should it disapprove of the petitioners' disclosures. This case presents but another form of the use of state power to achieve censorship. The lessons of this Court's decisions are that, however government power is contrived, the end of censorship is forbidden to it.

The Court in *West Virginia v. Barnette*, 319 U. S. 624, dealt with compulsion to profess a belief, not held, to the end that it might ultimately be embraced. Here it deals with a compulsion to acknowledge a belief, held presently or in the past, to the end that it may be removed from the intellect as a heresy. In both cases the issue is conformity. There the state objective was a generalized conformity embracing devotion to country. Here the state objective is a sharply specific conformity through the rejection by name of ideas and programs in fields where they must have full play in the process that determines the dynamics of the state itself. There, to the end that officialdom might have no opportunity to "coerce" the "consent of the governed," the Court was prompted to remind government that it may not be "partisan or enemy of any class, creed, party or faction" (319 U. S. p. 637). Here too the Court is called upon to prevent a subversion of our institutions by government partisanship and here that partisanship lies in open opposition to specific ideas identified by content only. Here government censorship is much further advanced toward "exterminating dissenters" and in consequence the "free and responsi-

ble government" of Jefferson and Madison is the more seriously endangered.

The case at bar does not turn on whether the County has or will in fact use its program to inflict or cause to be inflicted any reprisal, economic or social, upon petitioners for the expression of any opinion. The infliction of penalties for opinions specifically expressed is only one aspect of the suppression of speech and thought worked by any censorial system. The mere existence of any censorial program "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." (*Thornhill v. Alabama*, 310 U. S. 88, 98.) The power of a censor "is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censor comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion" (310 U. S. p. 97). For these reasons one may challenge a licensing system without first applying for a license and encountering a specific refusal, and the same truths hold here.

The system of compelled accounting which the County here seeks to establish would at the moment of its institution raise a "pervasive threat" of penalty and cast a "pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." In plain terms, if the disclosures sought in paragraph "D" may be compelled, a "pervasive restraint" immediately falls over all speech, thought and association which its

employees may reasonably anticipate might displease the County, including at a minimum all contact with or support of any of the specifically listed organizations. This is the more especially true because those organizations are frankly regarded by the County with at least a suspicious eye. If disclosure of connections with or support of those organizations may be compelled, fear of reprisal is more real and therefore the more immediately restraining and coercive upon petitioners to be silent, to recant or to embrace the opposite of the opinions and advocacy indicated in paragraph "D."

In this manner the County asserts coercion over its employees with respect to their choice and expression of ideas within an area broad in range and touching matters of utmost significance. Included are not only the great international questions of our day raised by the issue of private property *versus* socialization of the means of production, but also a vast gamut of more transitory questions such as price and rent control, the poll tax, racial and religious discrimination, defense of labor leaders like Tom Mooney and Harry Bridges, support for the Spanish Loyalists, support of those fighting for Indonesian independence, the program of small political parties such as the Farmer Labor Party.

To tolerate power in government thus to restrain and coerce all or any part of the people in their choice and expression of ideas with respect to such an array of subjects is to tolerate *usurpation*. The people alone have authority to make ultimate societal policy respecting those, as all other, issues in our nation's destiny. And in their

exercise of judgment in making such choices, the people plainly must have independence and free agency, else their judgment is not their own and their authority exists only in name. For the state to control or improperly influence the people, or so much as one among them, in the making of the choices here described, is for the state to arrogate to itself, *pro tanto*, the sovereign authority which the Constitution vests in the people. That is why this Court has always guarded freedom of speech so jealously. That is why it has always denied the existence of power to censor or to discriminate in the area of speech. To permit government to control or improperly influence the free agency with which the people conduct themselves as members of the nation's "ultimate tribunal"[43] is to surrender the foundation of the nation.

[43] *Yick Wo v. Hopkins*, 118 U. S. 356, 370.

POINT THREE

The Requirement Under Paragraph "B" of the Oath and Affidavit Prescribed in the County Loyalty Order That Petitioners Disclose Advocacy of, or Membership in a Political Organization Advocating, the Overthrow of the Governments of the United States, the State of California or the County of Los Angeles by Force and Violence Deprives Petitioners of Freedom of Speech, Press, Thought, Association and Assembly, in Contravention of the First and Fourteenth Amendments.

The County, by paragraph "B" of the Oath and Affidavit prescribed in the Loyalty Order, requires that petitioners disclose whether they are (or at any time since December 7, 1941, have been) advocates of, or members of any political party or organization that advocates "the overthrow of the Government of the United States, or State of California, or County of Los Angeles, by force and violence" (P. 19). For the considerations urged in our statement of premises (Introduction, Subdivision A, *ante*, p. 11 ff) such an inquiry is directed at ascertaining (1) whether petitioners hold opinions on the subject matter indicated, (2) whether petitioners personally do propagate or have propagated (*i. e.*, advocated) those opinions, and (3) whether petitioners do so propagate or have so propagated through participation with their fellow citizens. The requirement of paragraph "B", therefore, is invalid for all of the reasons set forth in the preceding subdivisions of this brief and they are hereby specifically incorporated here by this reference. For two reasons it has seemed advisable, however, to give this portion of the Loyalty Order separate consideration. First, the emotional value judgment which the language of paragraph

"B" carries may obfuscate the clear constitutional principles which make paragraph "B" invalid. Second, the California court rested its decision in large part on premises respecting advocacy of force and violence which can not be reconciled with the Federal Constitution or the decisions of this Court (P. 56, 62-63)."[48]

A. As a Requirement of Disclosure of Opinion Paragraph "B" Is Invalid.

In the area of opinion the Loyalty Order would compel the disclosure of the citizen's opinions on the use of violence in accomplishing political change. It is to be noted that *any* answer to this question discloses an opinion. It may reveal that the citizen approves the use of violence or abhors it or takes some intermediate ground based upon specific circumstances. But no answer can be made that does not disclose an opinion.

The inviolability of the citizen's conscience under our Constitution is absolute. It is subject to no qualification dictated by the nature of the ideas held. However hateful or reprehensible the idea of using violence to accomplish political change may appear to the County officials, or any other officers of government, including the courts, those officers can not compel the citizen to state whether or not he entertains or has entertained in the privacy of his conscience that or any other idea. While the First Amendment continues to embody the philosophy of Jef-

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[48]It is to be noted that the County Loyalty Order imposes the disclosure requirements of paragraphs "B" and "D" in a single inseparable demand. The Loyalty Order nowhere permits petitioners to comply with its terms by signing one paragraph without the other. Invalidity of either paragraph alone, therefore, is separately sufficient to invalidate the entire Order.

ferson and Madison, government is strictly forbidden so to probe into opinion.[46] We incorporate here the Introduction and Point One, subdivision A of this brief.

B. As a Requirement of the Disclosure of Advocacy, Personally or in Association With Others, Paragraph "B" Is Invalid.

In the sense here indicated, paragraph "B" is calculated to force disclosure of the profession and propagation of opinion favoring the use of force to accomplish political change. The Loyalty Order commands disclosures of such propagation whether by individual effort or through association with others. Either form of advocacy is an exercise of free expression and both are equally entitled to the protection of the First Amendment. (See Introduction and Point One, subdivision B).

It is of central importance to this entire discussion that the demand for disclosure is in no way limited to advocacy under any specific set of facts or circumstances. Rather, it reaches advocacy or propagation of any kind under any circumstances touching on the question of the use of force in accomplishing political change. Through the disclosures demanded, the State would reach to "expressions of opinions and exhortations,"[47] both forensic and dissertative as well as to "agitation . . . calling for present violent action".[48] So sweeping an inquiry offends the Constitution.

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[46] "If there be any among us who would wish to dissolve this union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." (Jefferson, *First Inaugural Address*, Works, Mem. Ed. Vol. 3, pp. 318-319.)

[47] Holmes, J., dissenting, *Abrams v. United States*, 250 U. S. 616, 631.

[48] *Schneiderman v. United States*, 320 U. S. 118, 157.

The command of the First Amendment is unequivocal and absolute:

> "Congress shall make no law . . . abridging the freedom of speech; or of the press; or of the right of the people peaceably to assemble . . ."

Within the area of expression the Congress shall make *no law*. Advocacy of ideas and opinion as distinguished from acts and conduct receive unqualified immunity so that those who are governed in a democratic society may have full access to all ideas and full freedom to discuss them in the performance of their duties as the "depository of the ultimate powers of society."[49] Combined with the Fourteenth, the First Amendment means that no government in the United States may transgress its sweeping command of *no law*. The prohibition is not restricted to those ideas deemed wise or harmless by officialdom. Whatever the content of the idea[50] government cannot interpose against its content or expression. For in these areas the only form of control needed or appropriate in a free society is the competition of free debate in the marketplace of thought.

The clear and present danger rule works no limitation upon the First Amendment. That rule is designed to demark the line between advocacy and action in the often difficult penumbral area between the two. It carves out no area of advocacy subject to government action predicated upon the content of the opinions advanced. It attempts to define the point at which advocacy passes

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[49]Jefferson, Letter to William Charles Jarvis, September 8, 1820. Works, Mem. Ed. Vol. 15, p. 278.

[50]Excluding only the defamatory, the obscene and the "fighting" words, none of which is involved here. See *ante*, p. 27.

over into conduct within the reach of governmental power. In this highly difficult zone the clear and present danger rule was formulated to assist the Court in the delicate task of finding the line where advocacy flows inseparably into action threatening an evil to the state "under circumstances affording no opportunity to test the merit of ideas by competition for acceptance in the marketplace of public opinion" (*Thornhill v. Alabama*, 310 U. S. 88, 104-105; see also Brandeis, J., concurring in *Whitney v. California*, 274 U. S. 357, 377).

It is of primary importance to the disposition of this issue in the case at bar, that it be observed that the clear and present danger rule applies, and can only apply, to the specific circumstances of a particular case. As Mr. Justice Holmes stated in his original formulation,

> " . . . But the character of every act depends upon the circumstances in which it is done . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic . . . The question *in every case* is whether the words used are *used in such circumstances* and *are of such a nature* as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."—*Schenck v. United States*, 249 U. S. 47, 52. (Emphasis added.)

And in all cases since, the Court has determined where the state may intervene only in the light of the specific utterance and the circumstances in which it was used. (See *Thornhill v. Alabama*, 310 U. S. 88, 104-105; *Bridges v. California*, 314 U. S. 252, 263, 268-270; *Thomas v. Collins*, 323 U. S. 516, 529 ff; *Craig v. Harney*, 331 U. S. 367, 376.)

If advocacy can merge with conduct, then it does so, not in the abstract, but in the conditions under which it is uttered—the circumstances obtaining at the time. Paragraph "B" does not require disclosure of advocacy of the use of violence in the accomplishment of political change under circumstances merging it with conduct within the reach of the State, rather, it inquires concerning all such advocacy irrespective of circumstances. It is, therefore, directed at speech, not conduct, and is violative of the First and Fourteenth Amendments.

For advocacy of the use of force in accomplishing political change, absent circumstances in which that advocacy flows immediately and inseparably into the force urged, is still free speech:

> "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time —prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and calm processes of thought and reason. *Cf.* Bridges v. California, 314 U. S. 252, 86 L. Ed. 192, 62 S. Ct. 190, and Justice Brandeis' concurring opinion in Whitney v. California, 274 U. S. 357, 372-380, 71 L. Ed. 1095, 1104-1108, 47 S. Ct. 641. See also Taylor v. Mississippi, 319 U. S. 583, *ante*, 1600, 63 S. Ct. 1200, Nos. 826-828 this term."—*Schneiderman v. United States*, 320 U. S. 118, 157-158.

Absent a limitation of the paragraph "B" inquiry to specific facts and circumstances merging advocacy with action, its validity can be justified to this Court only upon

the assumption that doctrines advocating the overthrow of government by force and violence *in and of themselves* constitute a clear and present danger. So to apply the rule would pervert it. The question would be changed from, "Has the advocacy, under the circumstances, merged with dangerous conduct?" to "Are the ideas advocated dangerous?" From a delicate instrument for assaying conduct, it would become an instrument for repression permitting government to "censor" the thoughts and speech of "those whose convictions and affiliations it does not tolerate." (*Danskin v. San Diego School District*, 28 Cal. 2d 536, 545.)[51]

Once the government obtains power to exclude from the marketplace of public opinion ideas because they are dangerous, the door has been shut upon political change achieved through the processes of representative government. New ideas are always dangerous to those in power, and in America, as elsewhere, that power has historically been exerted against change. A hundred years and more ago the idea of abolishing slavery was so treated. Then, as now, the claim was that only advocacy of violence was

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[51]In the *Danskin* case was presented the validity of a requirement that applicants for a permit to hold a meeting in a public school, generally available to all, sign an affidavit denying that they advocate and that they are "affiliated with any organization which advocates or has as its object or one of its objects the overthrow of the present Government of the United States or of any State by force or violence, or other unlawful means." There, after a careful review of this Court's opinions, the California Supreme Court held that the clear and present danger rule applied to such compulsory disclosures and that the failure to apply it to such a requirement of disclosure turned the inquiry into simply a probe of opinion. On authority of this Court, the California court said, "doctrines advocating the overthrow of the government by force do not of themselves constitute a substantial danger." (28 Cal. 2d p. 543.)

attacked. Then, as now, the claim was counterfeit and if it deceived anyone it did not and could not deceive history. Not advocacy of violence but advocacy of equality was suppressed; not insurrectionists but the Constitution suffered assault.

Few if any ideas have ever been subjected to more savage societal efforts at repression than the cause of abolition. Every conceivable weapon of retaliation was employed against its advocates.. Abolitionists were jailed, lynched, beaten and stoned, with official approval if not participation.[83] Their papers were suppressed by laws[84] and excluded from the mails by executive action.[85] To speak abolitionism in the South meant death.[86] And all this repression, legal, semi-legal and extra-legal, was justified by its perpetrators, when justified at all, as the suppression of advocacy of violence and insurrection.[86]

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[83]Birney, *James G. Birney and His Times* (Appleton & Co., N. Y., 1920), pp. 184-191, 230 ff.; Macy, *The Anti-Slavery Crusade* (Vol. 28 "The Chronicle of America," edited by Allen Johnson), pp. 70-71, 75-77, 83; Wilson, *The History of the Rise and Fall of the Slave Power in America* (Houghton, Mifflin & Co., 7th Ed.), Vol. I, Ch. XXV, Vol. II pp. 671-672; Goodell, *Slavery and Anti-Slavery* (Harned & Co., N. Y., 1852), Ch. XXXIII, XXXIV; Whipple, *The History of Civil Liberty in the United States* (N. Y., 1927), pp. 84-89.

[84]Wilson, *supra*, Vol. I p. 196, Vol. II p. 670; Whipple, *supra*, pp. 89-90; Birney, *supra*, pp. 130 *et seq.*, 190-197; Macy, *supra*, p. 83; *Third Annual Report of the American Anti-Slavery Society* (William Dorr & Co., 1836), p. 49.

[85]Macy, *supra*, pp. 75-77; Birney, *supra*, pp. 184-191; Whipple, *supra*, pp. 108-114.

[86]*Third Annual Report of the American Anti-Slavery Society*, *supra*, pp. 18, 50-51; Wilson, *supra*, Vol. I pp. 558-559.

[86]President Jackson in December, 1835, in a message to Congress and the nation, denounced the abolitionists as persons engaged in "unconstitutional and wicked" attempts to "instigate the slaves to insurrection," as evil, malicious men seeking to precipitate "all the horrors of a servile war." (*Congressional Globe*, 24th Cong., 1st

The cold record of history makes it plain that the South and its defenders repressed the abolitionists not because they advocated violence, but because they advocated an end to slavery.[57] It was not appeal to violence but to conscience which the South feared.[58] Knowing the re-

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Sess., 1835-1836, pp. 4, 10.) Congressman Garland of Virginia branded abolitionists "murderers" on the floor of the House of Representatives. (*Congressional Globe*, 24th Cong., 1st Sess., 1835-1836, App., pp. 15, 17.) The Legislature of Alabama memorialized Congress and the northern states to outlaw abolitionist societies as "malicious and heartless societies" whose literature was "calculated to destroy our peace and sever this union." (Sen. Doc. No. 124, 24th Cong., 1st Sess., 1835-1836.) In Kentucky the newspaper, "The Baptist Banner," raged against abolitionists: "We can not call them misguided philanthropists or enthusiastic Christians, but revolutionists and assassins." (Martin, *The Anti-Slavery Movement in Kentucky* (1918), p. 77.) In Richmond, Virginia, a massed assemblage of the "leading citizens" of that city passed a resolution denouncing abolitionist societies as "incendiary and seditious associations" (*Third Annual Report of the American Anti-Slavery Society, supra*, p. 57), and a comparable assemblage in Alabama called them associations of persons "whose sole and avowed object is to sow the seed of discord, rapine and murder among the slaves of the South." (*A Collection of Valuable Documents*, "James G. Birney's Letter; A Vindiction of Abolitionists" (Isaac Knapp Co., 1836), pp. 6-8.)

[57]The literature of the abolitionists could scarcely have been authored to incite insurrection by the slaves. Not only was it universally peaceful in content, but it was sent not to the slaves but to their southern masters (hardly likely subjects for insurrectionary propaganda) and in any event, the slaves could not read. (Goodell, *supra*, pp. 415-416 and Ch. XXXII; Macy, *supra*, Ch. V; Birney, *supra, passim; A Collection of Valuable Documents*, "Protest of the American Anti-Slavery Society to President Jackson, Dec. 26, 1835" (Isaac Knapp Co., 1836), pp. 46-47.)

[58]"We believe that we have most to fear from the organized action [of the abolitionist societies] upon the CONSCIENCES and fears of the slaveholders themselves; from the insinuation of their [the abolitionists'] dangerous heresies into our schools, our pulpits and our domestic circles. It is only by alarming the *consciences* of the weak and feeble, and diffusing among our own people a morbid sensibility on the question of slavery, that the abolitionists can accomplish their object." (Editorial from the southern newspaper, "The United States Telegraph," quoted in *Third Annual Report of the American Anti-Slavery Society, supra*, p. 47.)

alities of popular government, they realized that such appeals, finding receptive ears, could arouse men to associate together for the advancement of that cause, and so their desperate cry was to nip the movement in the bud before it gained political momentum. Thus, John Calhoun spoke to and for all southern society in 1835 in announcing forthrightly that the real danger of the abolitionists lay in their efforts to "make their movements the basis of a powerful political party . . . diffusing, as widely as possible, hatred against the slaveholding states."[59] Henry Clay of Virginia expressed the same feeling: "These ultra-abolitionists have ceased to employ the instruments of reason and persuasion, have made their cause political and appealed to the ballot box . . . "[60] Calhoun and Clay correctly apprehended the functions of free speech; when men can examine ideas through discussion they will seek to effectuate them through the ballot. To stop change the South outlawed ideas in the name of preventing force and violence. Because of this, there was visited upon this country, through the Civil War, the cruelest form of force and violence for the accomplishment of political change in its entire history.

History is as inexorable as logic. Change, no matter how far-reaching, can not be prevented by suppressing its spokesmen as advocates of force and violence. If men find truth in the idea they will effect the change whether or not authority wills it. Authority can suppress advocacy of change and destroy representative government, or permit full discussion and avert resort to force. The choice

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[59]Quoted in *Third Annual Report of the American Anti-Slavery Society*, *supra*, p. 47.

[60]Quoted in Birney, *supra*, p. 345.

is between preserving the democratic process and ravaging it.[a]

> ". . . The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." —*De Jonge v. Oregon*, 299 U. S. 353, 365. (See also *Stromberg v. California*, 283 U. S. 359; *Fiske v. Kansas*, 274 U. S. 380.)

The position of petitioners here is that of the nation concerning the principles to govern the relation of men to government world-wide, in respect of the great ideological conflicts of the present era:

> "The present laws of the United States prevent incitement to violence for any reason when there is a clear and present danger that violence will actually result. Long experience with the problem of free speech has led to the conclusion that any greater limitation would be liable to misuse for the purpose

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[a] "Our faith in American democracy is confirmed not only by its results, but by its methods and organs of free expression. They are the safeguards against revolution. To discard the methods of representative government leads to the misdeeds of the very extremists we denounce—and serves to increase the number of the enemies of orderly free government." (Statement of Governor Alfred E. Smith of New York in 1920 *apropos* the exclusion of five socialist deputies from the state legislature, *Progressive Democracy: Adresses and State Papers of Alfred E. Smith* (Harcourt, Brace & Co. (1928), p. 273.)

of suppressing free speech. It is felt that the utmost freedom of speech is a better safeguard against hostility and violence than general laws giving increased powers to suppress freedom of speech".—Statement of the United States Representative at the Seat of the United Nations to the Secretary-General of the United Nations, April 15, 1948.[61a]

[61a]Set forth in *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation*, Memorandum by the Secretary-General, April 16, 1948, E/CN.4/82 at page 12.

POINT FOUR

The Deprivations of Freedom of Thought, Speech, Press, Religion, Association and Assembly Effected by the County Loyalty Oath May Not Be Excused Merely as a Regulation of Public Employees in the Civil Service. The Standards of the Loyalty Oath Are so Lacking in Ascertainable Meaning as to Define No Permissible Objective Related to the Effectiveness of the Public Service.

A. The Position of the Court Below.

The California court justified the Loyalty Order on the thesis that petitioners in entering upon public employment gave up the constitutional freedoms here urged (P. 51). At the outset it should be noted that the "surrender" relied upon by the California court was an implied surrender, not express, for it pointed to no provision of local law or employment contract creating such a cession. Indeed the Court ignored a provision of the Los Angeles County Charter[62] specifically to the contrary. It provides:

> "No person in the classified service, or seeking admission thereto, shall be appointed, reduced, or removed or in any way favored or discriminated against because of his political or religious opinions or affiliations."—Los Angeles County Charter, Sec. 41 (Statutes of Calif., 1913, p. 1484).

The County's contract of employment, therefore, protects and preserves the freedom of conscience and association invaded by the Loyalty Order. There was no waiver or

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[62]By California law county charters are adopted by the county through referendum and are subject to approval by the legislature, after which they become "the organic law" of the County. (Calif. Const., Art. XI, Sec. 7½.)

surrender of these freedoms arising from the terms of the contract.

There remains the question whether such a surrender can be effected by operation of law because of the nature of public employment. Petitioners and their 20,000 fellow employees do not surrender their citizenship upon entering such employment. They are still subject to the powers of government at all levels, to tax, to take their property for public use, to build public improvements, to declare war and require their service in the armed forces, and to affect the private lives of citizens in all the manifold ways that local, state and federal governments impinge upon them. In all of these activities government represents public employees as all other citizens. They participate in the elective process to express a choice on men and measures in local, state and federal governments.[88] They are entitled, as other citizens, to be free of government censorship in the processes of thought, discussion and association which lead to enlightened public opinion. The Constitution recognizes no second class citizenship. Representative government does not serve its purpose when some citizens freely perform their governmental functions and others are permitted by law to perform theirs only in part. Since representative government rests upon a consensus of all the governed, it destroys itself when it uses its powers, including that of employment, improperly to influence or control the participants or any among them in arriving at that concensus.

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[88]In California the people may participate directly in the legislative process and in the adoption and amendment of state statutes and the state constitution and local charters through the initiative and referendum. (Calif. Const., *supra*, Art. IV, Sec. 2.) The initiative is therein described as "the first power reserved to the people" and the referendum as "the second power reserved to the people."

When the court below held that public employees could bargain away the constitutional safeguards to their exercise of the freedoms of thought, speech and association, it in effect concluded that the all-important governmental functions of a free people in a democratic society could be corrupted by contract. By virtue of this holding, government, whose powers rest on consent of the governed, may purchase at least a part of that consent by the inducement of jobs.

It is an old and familiar concept that public officers in the performance of public duty must act only according to their own conscience and their own honest judgment. Any contract whereby their action or inaction is induced, influenced or controlled by special or private consideration is contrary to elementary public policy and void. (17 C. J. S., *Contracts*, pp. 573, *et seq.*; 12 Am. Jur., *Contracts*, Secs. 203-5, 206-8, 186, *et seq.*; *Rest. of Contracts*, Secs. 559-562, 565, 540-558.)

The same rule of policy applies to the citizen charged with powers and duties of greater societal and public import—as he most assuredly is when participating in the processes of democratic self-government. His participation in activities directed to the formulation of political opinions and the expression of them through speech and association are intimately and determinatively related to the final exercise of the sovereign power to make and enforce policy through the ballot. This is how a government, representative of and responsible to the governed, functions under our constitutional system. All avenues of information and expression must be open to the citizen, and his conscience in the exercise of these governmental functions may not be bought or sold.

"A bargain by a *citizen* or a public official to obtain private advantage for performing or promising to

perform, *or from refraining* or promising to refrain from performing a duty devolving upon him as such, is illegal.

"Comment:

"a. Certain duties devolve upon all citizens, some of which, like the duty to vote, are enforced by no direct sanction. Whether so enforced or not, a bargain to obtain pay or other advantage for performing them, is illegal. So likewise is a similar bargain *to refrain* from performing them. The same principle is applicable to the duties of public officials."—*Rest. Contracts,* Sec. 567. (Emphasis added.)

See also, *2 Elliott Contracts* (1913 Ed.), Section 714; *Martin v. Wade,* 37 Cal. 168, 174; *Newell v. Purdy,* 36 Wis. 213, 223-5; *Gaston v. Drake,* 14 Nev. 175, 188; *Nichols v. Mudgett,* 32 Vt. 543, 548.

And just as citizens may not by private contract barter away their own judgment in the area of public policy-making, neither may they bargain away their rights and duties to assist their fellow citizens in forming their judgments therein through the media of freedom of speech on matters of public concern. Freedom of speech is truly a duty as well as a right and he who has something to say which he believes needs to be heard on a matter of public import has no more right to place a purchase price on his silence than he has to place one on his ballot envelope. Thus in *Board of Education of the Borough of Lawnside v. Haddon Farms,* 128 N. J. L. 306, 25 A. 2d 905, citizens engaged in protesting certain legislation agreed to cease expressing opposition thereto for a consideration. Of this, the Court said at page 306:

"In a democracy, citizens should freely express their opinions to their representatives in the legislature, and agreements to reward them, directly or

> indirectly, if they suppress their views, are void . . . The representatives of the people must be free to learn the views of their constituents upon public matters and promises to pay money, if such views be suppressed, are void."

In *Spayd v. Ringling Rock Lodge No. 665*, 270 Pac. 67, 113 Atl. 70, the Court struck down a provision in a trade union constitution forbidding members from favoring or opposing legislation in opposition to views of the union's national legislative committee:

> "Since plaintiff viewed the statute petitioned against as such a grievance, the course of conduct pursued by him was not merely within his legal rights, but accorded with his solemn duty as a citizen, for the exercise of which he can under no circumstances be penalized".
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> "The right in question is a fundamental one . . . possessed by members of the state or 'citizens' . . . to work out public weal, rather than by individuals to protect their persons or property or serve private ends . . . . and, when this is kept in view, it is apparent that such a prerogative can neither be denied by others nor surrendered by the citizen himself." —270 Pa. 67, 70, 71.

In fine, then, freedom of speech, thought and association are trusts and duties, not merely rights. They are not the citizen's to dispose of by private contract. Expression and the holding of honestly reached opinions on matters of public concern according to conscience and honest uncorrupted judgment cannot be made the subject for sale, barter or surrender, and the District Court of Appeal erred in conceiving otherwise.

Of the authorities relied upon by the California court none deserve consideration with the exception of a rather ill-considered aphorism of Mr. Justice Holmes when sitting on the supreme bench of Massachusetts[84] (*McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N. E. 517) and the decision of this Court in *United Public Workers v. Mitchell*, 330 U. S. 75. These cases deal with the power of government to bar its employees from partisan political activities, such as soliciting campaign funds, or serving as a ward committeeman, or paymaster, or poll worker for a political party. These cases approve such limitations on government employees. They do so on the premise that this is necessary in order that public employees may not become pawns of their superiors or dispensers of government favor as the purchase price of political loyalty. But the kind of activity within the reach of government is only *partisan party politics*. This is made clear in the *Mitchell* case:

> ". . . With that limitation only [*i.e.*, 'partisan activity'] employees may make their contributions to public affairs or protect their own interests. . . ." (330 U. S. at p. 99.)

Here there is no attempt to prohibit or regulate partisan party activities. The Loyalty Order is directed frankly at the holding and advocacy of views, not the building of a political machine. This Court was at pains to point out that it did not approve in the *Mitchell* case any governmental interference with "expression, public or private, on public affairs, personalities and matters of public interest" by government employees (330 U. S. at p. 100).

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[84] "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract." (P. 52).

The court below erred in yet another and more important respect in relying on the breadth of language in the *McAuliffe* case. It is not true that public employees "suspend" their "constitutional rights of free speech" in accepting public employment. As this Court pointed out in the *Mitchell* case at least some constitutional limitations do apply to government regulations of its employees: "No one would deny" the incapacity of government to adopt "a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass . . ." (330 U. S. p. 100).[46] In other words government may not discriminate among causes, sects or races, to favor some and disadvantage others. This points to the more basic difference between the case at bar and both the *McAuliffe* and the *Mitchell* cases. There the prohibition was general in terms applying to all parties. Here the Loyalty Order is specific and selective. It is directed at certain ideas and certain associations, by name as listed in paragraph "D." It is like the regulation against the "Republican" disapproved in the *Mitchell* case. It places the weight of government power on the scales of public opinion against the named causes; the government becomes a partisan. Government must remain neutral in all contests of opinion, religious or secular (*Cf. Everson v. Board of Education*,

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[46]See also the significant statement by Justice Cardozo for the New York Court of Appeals:

"A citizen may not be disqualified because of faith or color from service as a juror. . . . For like reasons we assume that he may not be disqualified because of faith or color from serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as a contractor by the government. It does not follow, however, that he may be declared *disqualified* from service, unless the proscription bears some relation to the advancement of the public welfare." (*People v. Crane*, 214 N. Y. 154, 168; 108 N. E. 427, 431.)

330 U. S. 1, 18). The true meaning of the *Mitchell* case here is that this form of government regulation of its employees is void because discriminatory.

The facts of modern society make this a problem of pressing importance. The case at bar presents the effort to abridge the liberties of 20,000 persons in Los Angeles County because they are public employees. But nation-wide, public employees constitute 10% of the working force.[66] Since the working force constitutes virtually the entire adult population, it is a proper deduction to say that nearly 10% of the *voting* population is public employees. The effect of the rationale below is to handicap 10% of the electorate, to change government by consent of the governed to government by consent of 90% of the governed. Ten per cent of those whose function it is to register their will in government is not a group to be lightly cast out of the democratic process, blinded and gagged by arbitrary censorship so that information they need to obtain is not available and that which they have to give may not be communicated.

But the evil does not stop there. To the negative effect of political eneuchism upon 10% of the electorate must be added the potential for corruption of all political processes which this 10% must needs beget. Now subject to inquisition about views which they express and espouse, the public employees will be constrained in the interests of self-protection to avoid all but the most acceptable. Since their position and advancement depend on the approbation of their superiors, the standard of

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[66]In April, 1948, 5,900,000 persons were employed by federal, state or local governments out of a total of 58,330,000 employed persons. In September, 1949, the figures were 5,751,000 and 59,720,000 respectively. (*Survey of Current Business*, Dept. of Commerce, Bureau of the Census.)

acceptability becomes agreement with those who hold the reins of power. The 10% thus become a malleable political force whose enforced inertia facilitates their being moulded to the interests of officialdom.

B. The Loyalty Order Prescribes No Ascertainable Standard of Permissible Action by the State in the Interest of the Effectiveness of the Public Service.

The County Loyalty Order is cast in such loosely drawn and all-embracing terms that it fails to specify any permissible objective related to the effectiveness of the public service. Where regulations and prohibitions threaten to impinge upon the areas of opinion, expression and association they must observe strictly the rules of definiteness in order to avoid censorship over the minds of men. (*Thornhill v. Alabama*, 310 U. S. 88, 97-98; *Winters v. N. Y.*, 333 U. S. 507, 517-518.)

By this principle standards for measuring thought, speech and association cast in loose and indeterminate terms have been consistently stricken down. Illustrative are a proscription of "malicious, scandalous and defamatory" publications or publications not considered to be "usual and legitimate" (*Near v. Minnesota*, 283 U. S. 697, 712-713); prohibition of publications that "so massed their collection of pictures and stories of bloodshed and of lust 'as to become vehicles for inciting violent and depraved crimes against the person'" (*Winters v. N. Y.*, 333 U. S. 507, 514); power to refuse a license for the distribution of leaflets to persons who are "not of good character" or whose cause is "not free from fraud" (*Schneider v. Irvington*, 308 U. S. 147, 158-159); standard permitting a state officer to determine whether a "cause is a religious one or is a *bona fide* object of charity" (*Cantwell v. Connecticut*, 310 U. S. 296, 302); punish-

ment of peaceful picketing at a place of business "without a just cause or legal excuse" (*Thornhill v. Alabama*, 310 U. S. 88, 91, 100); displaying a red flag "as a sign, symbol or emblem of opposition to organized government" (*Stromberg v. California*, 283 U. S. 359, 369).

The standards employed in the Loyalty Order are no less defective. It requires compulsory disclosures of thought, speech and association in order to elicit information by which the County may detect

1) "any known subversively inclined persons" (P. 18, par. 8).

2) "any Communists, avowed or otherwise" (P. 16, first par. of Ex. A),

3) "an advocate of subversive or Communistic doctrines" (P. 18, second full par.).

The standard, "any known subversively inclined persons" is similar in point of vagueness to that considered in *Lanzetta v. New Jersey*, 306 U. S. 451, which held void a criminal statute by its terms applicable to persons "known to be a member of any gang." The language was held void for want of certainty:

> ". . . The enactment employs the expression, 'known to be a member.' It is ambiguous. There immediately arises the doubt whether actual or putative association is meant. If actual membership is required, the status must be established as a fact, and the word 'known' would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons. And the statute fails to indicate what constitutes membership or how one may join a 'gang.' "—*Lanzetta v. New Jersey*, 306 U. S. 451, 458.

One of the two key words in the Loyalty Order standards is "subversive." Subversive of what is not indicated. Assuming, without basis in the order itself, that "subversive of government" is intended, this expression has become so warped from repetitious use by the over-zealous opponents of departure from the *status quo* that it now conveys only the spleen of its user:

> "In times of fear or hysteria, political, racial, religious, social, and economic groups, often from the best motives, cry for the scalps of individuals or groups because they do not like their views. Particularly do we need to be dispassionate and courageous in these cases which deal with so-called 'subversive activities' . . . Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as subversive. We must not forget that it was not so long ago that both the term *'Republican' and the term 'Democrat'* were epithets with sinister meaning to denote persons of radical tendencies that were 'subversive' of the order of things then dominant."—Attorney General (now Mr. Justice) Jackson. Address delivered before the Second Annual Conference of United States Attorneys at Washington, D. C., April 1, 1940.

The second key expression of the Loyalty Order standards is "Communist" and its variant "Communistic." "Communist" can mean a member of the Communist Party or a believer in a "system of society in which property and the instruments of production are held as a common trust and the profits arising from all labor devoted to the general good" (New York Standard Unabridged Dictionary, Funk & Wagnalls, 1941), or, again,

a hated opponent.[67] Membership in the Communist Party, *qua* membership, is no basis for adverse state action against the employee unless the state is prepared openly to acknowledge that its aim is to destroy "the essence of his guaranteed personal liberty." (*De Jonge v. Oregon*, 299 U. S. 353, 366. See, also, *Herndon v. Lowry*, 301 U. S. 242; *Schneiderman v. United States*, 320 U. S. 118, 157.) That an employee thinks his government could be improved if it took over ownership of some or all of the means of production is likewise no basis for action against him. Assuming this belief to be rejected by a vast majority of our people, including respondents, it remains a belief, and state interposition against the thought its officials may abhor is openly defiant of the principle of "freedom for the thought that we hate." (Holmes, J., dissenting, *United States v. Schwimmer*, 279 U. S. 644, 655; *Schneiderman v. United States*, 320 U. S. 118, 137.)

There are suggestions in the Loyalty Order and in the opinion below that the three standards here under examination actually mean "to advocate the overthrow of the government" (P. 18, 1st par.; P. 56). This is to define uncertainty with unintelligibility. The expression is not qualified as to method, whether peaceful or violent, lawful or unlawful, or as to time, whether the advocacy is for immediate change creating an emergency to the state or a prediction of future events. It can refer to far reaching change or violent destruction, or it can convey only

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[67]The opponents of public housing once called Senator Taft a communist for his sponsorship of public housing legislation. (See Hearings, Committee on Un-American Activities, House of Representatives, 80th Congress, 1st Session, October 20-30, 1947, p. 308. It has been held that the term "Communist" is too devoid of meaning to support a criminal prosecution for false statement in denying oneself to be "a Communist." (*United States v. Hautau* (D. C., N. J.), 43 Fed. Supp. 507, 508-509.)

the anger and bile of an opponent of ideas. For all the reasons set forth in Point Three, *ante*, the term is as meaningless as those it seeks to define. It creates no standard of permissible state action related to efficiency of the public service.

The County has failed to define a single objective justifying the compulsory disclosures required by its Loyalty Order. It has simply adumbrated a vast area of opinion which it proposes to investigate because it would expurgate.

Conclusion

The judgment of the court below should be reversed.

Respectfully submitted,

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